Supreme Court, U.S.
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No. (1) 08-471

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In the
Supreme Court of the United States

VENTURE INDUSTRIES CORPORATION,
Petitioner,

v.

AUTOLIV ASP, INC. (successor to Morton International, Inc.),
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the *Erie* doctrine permit a federal district court to apply 28 U.S.C. §1961, the federal post-judgment interest statute, to override state substantive damages law where the application of state substantive law would not in any way disturb federal procedures?

2. Should this Court resolve a conflict between the Sixth Circuit and the Eleventh and Ninth Circuits as to whether Federal Rule of Appellate Procedure 37(b) permits a district court to determine interest on a judgment when it executes an appellate mandate that is silent on allowance of interest?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Venture Industries Corporation ("Venture") states that it is the only remaining plaintiff in the proceeding in the court whose judgment is sought to be reviewed ("the district court"). Venture is now known as the Bankruptcy Estate of NM Holdings ("Estate"), Stuart A. Gold Trustee.

The other parties appearing in the lower court caption as Plaintiffs have no interest in the judgment of the district court. Vemco, Inc. and Patent Holding Company were Plaintiffs in the district court, but they have been combined into Estate. Larry J. Winget was the 100% direct shareholder of Patent Holding Company and the 100% indirect shareholder of Venture and Vemco, Inc. Because of orders of the bankruptcy court in the proceeding filed by Venture, Winget has no further interest in these proceedings.

Respondent Autoliv ASP, Inc. ("Autoliv"), defendant in the district court, is the successor in interest to Morton International, which was formerly a named defendant in the district court. Autoliv's parent company, Autoliv, Inc., was also an original defendant in the district court.

Pursuant to this Court's Rule 29.6, Venture states that neither Venture nor the Estate has any parent corporation or any shareholder that owns 10% or more of its ownership interests.

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Venture Industries Corporation ("Venture") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The judgment of the Court of Appeals (the "2008 Appeal") (App. A) was issued on July 10, 2008 without opinion. The 2008 Appeal arose from three related orders of the U.S. District Court for the Eastern District of Michigan (Cohn, J.):

- Amended Order Regarding Satisfaction of Judgment entered November 14, 2007 (App. B), which is unreported;

- Order of November 9, 2007 (App. C), which is also unreported; and

- Order Regarding Prejudgment and Post-Judgment Interest, dated October 30, 2007 (App. D), which is unofficially reported at 2007 WL 3202821.

Two other orders of the district court are relevant to this Petition:

- Second Amended Final Judgment In A Civil Case, dated November 29, 2006 (App. E), which is unreported; and

- Amended Final Judgment In A Civil Case (App. F), which is also unreported.

The Federal Circuit also decided three other appeals in this case:

- *Venture Indus. Corp. v. Autoliv ASP Inc.*, Nos. 04-1486, 04-1488, 196 Fed. App'x 894 (Fed. Cir. August 7, 2006), (the "Damages Appeals") (App. G);

- *Venture Indus. Corp. v. Autoliv ASP, Inc.*, No. 05-1537, 457 F.3d 1322 (Fed. Cir. August 7, 2006), (the "First Rule 60 Appeal") (App. H); and

- *Venture Indus. Corp. v. Autoliv ASP Inc.*, No. 07-1118, 227 Fed. App'x 923 (Fed. Cir. July 11, 2007) (the "Second Rule 60 Appeal"). App. I.

The First Rule 60 Appeal and the Second Rule 60 Appeal are not germane to this Petition. The Damages Appeal, as explained below, is relevant to the Rule 37 issue raised herein.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2008. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. §1961, as relevant to this Petition, provides:

§1961. Interest

> **(a)** Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.[1]

Michigan Compiled Laws §600.6013 provides in relevant part:

> **600.6013. Interest rate on judgment; settlement**
>
> (1) Interest is allowed on a money judgment recovered in a civil action, as provided in this section.
>
> (6) For a complaint filed on or after January 1, 1987, but before July 1, 2002, if the civil action has not resulted in a final, nonappealable judgment as of July 1, 2002, and if a judgment is or has been rendered on a written instrument that does not evidence indebtedness with a specified interest rate, interest is calculated as provided in subsection (8).
>
> (8) [I]nterest on a money judgment recovered in a civil action is calculated at 6-month intervals

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[1] The full text of §1961 is set forth in the Appendix. App. J at 71a-72a.

> from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.[2]

Federal Rule of Appellate Procedure 37 provides:

> Rule 37. Interest on Judgment
>
> (a) When the Court Affirms. Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered.
>
> (b) When the Court Reverses. If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.

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[2] The full text of §600.6013 is set forth in the Appendix. App. J at 73a-78a.

STATEMENT OF THE CASE

This case presents two questions arising from a common situation in federal courts – the determination of interest damages and interest on judgments in diversity actions. The two questions are:

- *Which law applies*: In a case based on diversity jurisdiction, like this case, determining interest damages implicates questions of federalism, namely the relationship between the federal post-judgment interest statute, 28 U.S.C. §1961, and state statutes providing for interest damages at rates different from the federal rate. Because it is settled that state interest damages are a substantive remedy controlled by state law, overriding state law by applying the federal post-judgment statute where there is no prejudice to a significant federal procedural interest violates the *Erie* doctrine.

- *Which court decides*: When a case, like this case, has been remanded to a district court from a court of appeals, Federal Rule of Appellate Procedure 37(b) ("Rule 37(b)") allocates to the court of appeals the responsibility for determining the allowance of interest on the judgment. A determination of interest by the district court therefore violates Rule 37(b).

These two questions are intertwined in this case because the wrong court applied the wrong law and as a result deprived Venture of $4.75 million in compensation to which it is entitled under Michigan law.

Specifically, the Federal Circuit, applying Sixth Circuit law, summarily affirmed the district court's holding that interest on a $27 million jury verdict began accruing under federal law, rather than state law, over four years before Venture could collect its damages. In so holding, the decision ignored the narrow federal policy underlying §1961 and thereby created an unnecessary collision between federal law and Michigan's substantive law on interest damages. That collision violates the constitutional principles of federalism established by this Court's *Erie* jurisprudence. In addition, the Federal Circuit applied Sixth Circuit precedent that ignores the clear dictates of Rule 37 and thereby renewed an existing conflict between the Sixth Circuit and the Eleventh and Ninth Circuits.

If the decision is allowed to stand, winners in federal court like Venture will be deprived of damages due them under state substantive law, while losers like Autoliv will receive a commensurate windfall and will enjoy an enhanced perverse incentive to pursue meritless appeals. Moreover, the decision below, by allowing a district court to make a determination expressly reserved to appellate courts, will engender needless litigation in the district courts and unnecessary appeals concerning interest questions that should and could have been resolved by the appellate court in the first instance.

A. The Underlying Dispute.

This proceeding arose out of a dispute between Autoliv, a "Tier One" supplier of automobile parts and Venture, a supplier to Autoliv, over patent rights and

contract rights relating to the manufacture and sale of airbag module covers that Autoliv had agreed to purchase from Venture. Venture filed suit in the U.S. District Court for the Eastern District of Michigan in 1999, alleging federal question jurisdiction over its patent claims and diversity jurisdiction over its contract claims. (The patent claims were later severed, arbitrated and settled). In December 2003, a jury awarded Venture $27,576,001 in damages on its state-law contract claims. On April 7, 2004, the district court entered an amended judgment, retroactively effective to December 4, 2003, in the amount of $33,459,134.84, which included $5,878,972 in interest damages as provided under Michigan law. App. F.[3]

B. The Damages Appeals.

Autoliv appealed the jury verdict on the ground that damages were excessive (App. K), and Venture cross-appealed as to the amount of interest damages appropriate under Michigan law (App. L). Because the case originally involved patent rights, the appeals were pursued in the Federal Circuit. App. M.

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[3] Michigan law does not explicitly provide for pre-judgment or post-judgment interest. Rather §6013(1) generally provides "Interest is allowed on a money judgment recovered in a civil action as provided in this section." Section 6013(8), which applies in this case, specifies a beginning date for interest, but no end date. The Michigan Supreme Court has construed the statute to provide for accrual of interest until a judgment is satisfied. *Gordon Sel-Way, Inc. v. Spence Bros, Inc.* 438 Mich. 488, 475 N.W.2d 704, 716 (1991)

In August 2006, the Federal Circuit issued its opinion on the Damages Appeals. The court affirmed the jury verdict, but remanded for a re-calculation of interest damages because Michigan law provided that interest damages commenced with the filing of the complaint:

> We, therefore, vacate the district court's calculation of prejudgment interest and remand the case to the district court to re-calculate the prejudgment interest consistent with this opinion, and subject to the outcome of the remand proceedings in the companion case.

App. H at 44a. The Judgment of the Federal Circuit in the Damages Appeals stated only, "Affirmed in part, vacated in part, and remanded." App. N.

After remand, the district court recalculated interest using the appropriate commencement date under Michigan law. On November 29, 2006, the court entered a Second Amended Final Judgment (App. E) in the amount of $34,482.413.34. That judgment increased interest damages from those included in the first amended judgment by over $1 million.

C. The Dispute Over Interest Damages And the 2008 Appeal.

In September 2007, after the Federal Circuit affirmed the district court's second denial of Autoliv's post-judgment Rule 60(b) motion, Autoliv paid $36,263,015.50 into the registry of the district court and sought an order that it had satisfied the Second Amended Final Judgment. Venture then moved the

district court for an order determining the amount of interest damages to be included in the final judgment. Venture's position was that interest damages accrued under Michigan law until the date of the Federal Circuit mandate in September 2007. Autoliv contended that state interest damages ceased on the date of the jury verdict in December 2003, almost four years earlier.

After a hearing, the district court issued an order on October 30, 2007 (App. D) adopting Autoliv's position and concluding that state interest damages were payable through December 4, 2003, the date of the original jury verdict. It then issued an Order which stated that the final amount of the Judgment was $36,418,483.50. App. C at 6a, ¶ 1. That amount was $4.75 million less than the amount that would have been due if interest had accrued as provided under Michigan law. App. O.

REASONS FOR GRANTING THE PETITION

I. THE *ERIE* DOCTRINE REQUIRES FEDERAL COURTS TO APPLY STATE SUBSTANTIVE DAMAGES LAW WHEN DOING SO DOES NOT CREATE A DIRECT CONFLICT WITH A FACIALLY APPLICABLE FEDERAL PROCEDURAL STATUTE.

A. Erie Requires Federal Courts Sitting In Diversity To Apply State Substantive Law In The Absence Of A Direct Conflict With Federal Procedural Law.

This Petition presents the Court with an opportunity to clarify that state substantive law

regarding interest damages applies in a diversity action despite the federal post-judgment interest statute (28 U.S.C. §1961) because application of state law will not interfere with the administration of federal proceedings and because the policies underlying the federal and state statutes are identical.

A federal court in a diversity action must, as a general matter, apply substantive state law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (determining that neither Congress nor a federal court has the authority to override substantive state law in diversity cases). For example, *Erie* requires application of state statutes providing for interest damages accruing before judgment. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Federal courts have generally held, however, that 28 U.S.C. §1961 governs a plaintiff's right to post-judgment interest in a diversity action. *See* Wright, Miller & Cooper, 19 *Federal Practice and Procedure* § 4511, n. 124. This Court has not, however, reached this issue.

Lower courts applying §1961 to state law claims generally do so on the perceived authority of *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). They construe *Hanna* to provide that the federal law trumps state law with which it directly "collides" as long as the federal law can be rationally construed as procedural, i.e., as a constitutional exercise of congressional power under Article III or the Necessary and Proper Clause. *See, e.g., Bailey v. Chattem, Inc.*, 838 F.2d 149, 152-153

(6th Cir. 1988).[4] Where, however, a state statute provides that interest accrues both before and after judgment, the federal interest is already protected, any conflict between § 1961 and the state law is illusory, and there is no direct "collision" between § 1961 and the state law.

Awards of pre- and post-judgment interest, therefore, do not involve the type of direct collision between *procedural* rules addressed by *Hanna v. Plumer*, 380 U.S. 460 (1965) (conflicting methods of service under Federal Rule of Civil Procedure 4 and Massachusetts state law), or *Burlington R.R. Co. v. Woods*, 480 U.S. 1 (1987) (Alabama mandatory affirmance penalty that conflicted with Federal Rule of Appellate Procedure 38). Instead, an award of post-judgment interest implicates only what this Court recognized in *Hanna* as "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* at 468. Unlike the situation in *Hanna*, applying state law instead of §1961 to impose substantive damages does not interfere with the "housekeeping rules for federal courts." *Id.* at 473 ("*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules").

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[4] In the abstract, of course, §1961 is constitutional because it is intended to compensate a prevailing plaintiff for the loss of use of the judgment. *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 834-35 (1990) (stating policy underlying §1961).

B. The Lower Courts' Simplistic Application of §1961 Ignores The Fundamental Underlying *Erie* Problem.

Many state laws provide for pre- and post-judgment interest on contract claims like those involved in this case. Most federal courts apply §1961 in these cases without analyzing the implicit *Erie* issue.[5] Instead they simply determine the date at the rate at which interest is calculated switches from state law to federal law. For example, in this case, the district court rejected Venture's *Erie* argument and looked to federal law, as declared in *Kaiser, supra*, to determine the date at which damages were meaningfully ascertained and, therefore, the date on which interest was calculated at the federal post-judgment rate. App. D at 12a-14a.[6]

Viewing the application of §1961 through the prism of *Kaiser*, however, masks the fundamental *Erie* issue because *Kaiser* involved only federal antitrust claims. In contrast, the fundamental choice of law issue in a diversity case is to determine whether federal law or state law should be applied to compensate the plaintiff

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[5] Another group of circuit court decisions applying §1961 in diversity actions awards post-judgment interest in tort and other cases where no pre-judgment interest is available under state law. This case and this petition do not implicate any *Erie* issues presented by that group of cases.

[6] *See, e.g., Forest Sales Corp. v. Bedingfield*, 881 F.2d 111, 111-13 (4th Cir. 1989); *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 848 F.2d 613, 622-24 (5th Cir. 1988); *Weitz Co. v. Mo-Kan Carpet, Inc.*, 723 F.2d 1382, 1385-87 (8th Cir. 1983); *Everaard v. Hartford Accident & Indem. Co.*, 842 F.2d 1186, 1193-94 (10th Cir. 1988).

for damages inflicted by the defendant under state law. In a diversity case, federal law may inform the calculation issue in this fashion, but it is state law and state law only that may determine the amount of interest damages recoverable.

C. Review By This Court Will Provide Needed Guidance On The Application of *Hanna*.

As Justice Harlan's concurrence in *Hanna* demonstrates (380 U.S. at 474 ff.), the *Hanna* "collision" test is not a final resolution of the *Erie* problem, even when a federal statute is arguably applicable. *Hanna* leaves a large gray area in which the application of otherwise constitutional federal statutes will adversely affect state law substantive rights. *See,* Wright, Miller & Cooper, 19 *Federal Practice & Procedure* § 4508 at n74 (2008). If the federal statute at issue "properly construed does not truly comprehend the disputed issue, then the decision as to whether federal or state law governs must be made with reference to the Rules of Decision Act and the Erie doctrine." *Id.* at n. 77. In short, *Hanna* was never intended to override state substantive law in diversity actions where application of state substantive law does not prejudice a procedural or "housekeeping" function of the federal court system.

Although this Court has re-visited *Hanna* only rarely in the last four decades, its decisions demonstrate that *Hanna*'s deference to federal law other than the Civil Rules must be addressed on a case-by-case basis. *Burlington Northern, supra*, offers a typical example and suggests that §1961 should not

trump state interest damages statutes. First, the Court recognized that the *Hanna* test is not absolute:

> The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules. See *Hanna, supra,* at 464-465, 85 S.Ct., at 1140.[7]

480 U.S. at 5.

Second, the Court drew a distinction between state laws that govern substance and the process affected by the state statute at issue:

> The choice made by the drafters of the Federal Rules in favor of a discretionary procedure *affects only the process of enforcing litigants' rights and not the rights themselves.*

480 U.S. at 8 (emphasis added). Thus, *Burlington Northern* teaches that *Hanna*'s deference to federal procedural law applies only after the court determines that the state/federal collision is procedural and not substantive.

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[7] *Burlington Northern* considered whether an Alabama statute that penalized unsuccessful appeals conflicted with Federal Rule of Appellate Procedure 38.

Another good example of the limitations of the *Hanna* deference to federal law is *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996), which considered a collision between a New York statute governing review of allegedly excessive damage awards and the Seventh Amendment guaranty to a jury trial. After reviewing post-*Erie* decisions, the Court phrased the issue as whether the New York statute would be "outcome affective" (*id.* at 428) or, in *Hanna*'s terms, "whether application of the [State's] rule would make so important a difference as to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the foreign state . . .". *Id.* at 428, n. 8.[8]

Measured against this standard, the New York statute contained both a "procedural instruction" and a "manifestly substantive" objective which, if applied literally in federal court, would be "out of sync" with the federal system's division of trial and appellate court functions, an allocation weighted by the Seventh Amendment." *Id.* at 426. The Court therefore held:

> It thus appears that if federal courts ignore the [state statute] and persist in applying [the federal standard] to damage awards on claims governed by New York law, "'substantial' variations between state and federal [money judgments" may be expected. See *Hanna*, 380

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[8] *Gasperini*'s analysis necessarily limits *Hanna's* narrow holding to cases involving a direct collision with a Federal Rule of Civil Procedure. *Id.* 427, n. 7. Any other reading of the case would ignore the fact that the collision with state law arose under the federal Constitution.

> U.S. at 467-468, 85 S.Ct. at 1142. We therefore agree with the Second Circuit that New York's check on excessive damages implicates what we have called *Erie*'s "twin aims." See *supra* at 2220. Just as the *Erie* principle precludes a federal court from giving a state-created claim "longer life . . . than [the claim' would have had in the state court," *Ragan [v. Merchants Transfer & Warehouse Co.]*, 337 U.S. at 533-534, 69 S.Ct. at 1235, **so *Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.**

Id. at 430 (emphasis added and footnotes omitted). The present case, of course, is simply the flip side of *Gasperini*. In *Gasperini*, federal law increased the plaintiff's recovery over that permitted by state law; here, federal law reduced the plaintiff's recovery. In either situation, *Erie* demands that that the federal court respect and apply state law.[9]

D. This Case Presents An Excellent Vehicle For Addressing The *Erie* Issue In The Context Of A Federal Statute That Potentially Implicates Both Substance and Procedure.

The district court in this case applied §1961 to deprive Venture of damages due it under §600.6013 of

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[9] Interestingly, the Court proceeded in *Gasperini* to hold that the federal interest in the administration of the federal court system could be protected by holding that the district court, not the appellate court, should apply the appropriate state standard.

the Michigan Statutes. According to the district court, §1961 required calculation at the lower federal rate from the date of the jury verdict in 2003. In contrast, §6013 unambiguously provides for interest at the higher state rate from the date Venture filed its complaint in 1999 until the date Autoliv satisfied the judgment in 2007. *Morales v. Auto-Owners Ins. Co.*, 469 Mich. 487, 672 N.W.2d 849, 852 (2003) (§600.6013 requires payment of interest prior to judgment); *Gordon Sel-Way, Inc. v. Spence Bros, Inc.* 438 Mich. 488, 475 N.W.2d 704, 716 (1991) (interest accrues under §600.6013 until satisfaction of judgment).

There is no "collision" between the procedural/housekeeping aspects of §1961 and this Michigan substantive law because both statutes address and advance the same policy. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 834-35 (1990) explains the federal policy:

> [T]he purpose of postjudgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant.

That policy is the same as Michigan's policy. *Gordon Sel-Way, supra,* 475 N.W.2d 704, 716 (1991). So the only "collision" between federal and state law in this case is that the district court applied §1961 to deprive Venture of compensation to which it is entitled under state law. Since the only impact of applying federal law is to create a difference in the amount of the judgment that Venture received in federal court compared to what Venture should have received in

state court, *Erie* and *Gasperini* preclude application of §1961.

II. THERE IS A CONFLICT BETWEEN CIRCUITS AS TO THE APPLICATION OF FEDERAL RULE OF APPELLATE PROCEDURE 37.

A. Rule 37(b) Precludes A District Court From Determining Interest Damages When The Remand Is Silent.

Rule 37(b) is derived from *Briggs v. Penn. R.R. Co.*, 334 U.S. 304 (1948). *Briggs* held that a district court is powerless to apply the federal interest statute, where the mandate of the court of appeals directed entry of judgment upon a verdict but made no mention of interest from the date of the verdict to the date of the entry of the judgment directed by the mandate. 334 U.S. at 306.

The Advisory Committee comment to Rule 37 expressly states that Rule 37(b) "is a reminder to the court, the clerk and counsel of the *Briggs* rule." The Federal Circuit, however, ignored that reminder in this case. Instead, the court of appeals found that the district court had committed no error of law in awarding post-judgment interest under federal law even though the appellate court had not directed it to do so. Applying the law of the Sixth Circuit to the orders of the district court, the Federal Circuit accepted the district court's reliance on *Bailey v. Chattem, Inc.*, 838 F.2d 149, 151 (6th Cir. 1988), to override Michigan substantive law in favor of §1961. App. D at 12a.

Bailey, however, reflects a judicial approach that contradicts Rule 37(b). In that case, the Sixth Circuit had vacated the original verdict for the plaintiff and then, on a second appeal, affirmed a more favorable verdict for the plaintiff. After the second remand, the plaintiff moved the trial court to recalculate interest damages. When that motion was denied, the plaintiff appealed. The Sixth Circuit rejected the defendant's argument that a trial court has no authority to determine interest damages on remand in the absence of a mandate directing that determination. *Id.* at 151. The court held that the trial court had properly determined interest on the judgment even though the mandate had been "appropriately silent on the matter of interest." *Id.* That holding violated Rule 37(b): When the remand mandate is silent about post-judgment interest, "the district court has no choice but to begin post-judgment interest with entry of the post-remand judgment." 20A *Moore's Fed. Prac.* § 337.12 (2008); 16A Wright, Miller & Cooper, *Fed. Prac. & Proc.* § 3983 (2008).

B. Sixth Circuit Law Conflicts With The Law of The Eleventh and Ninth Circuits.

The law of the Sixth Circuit, as articulated in *Bailey* and applied by the Federal Circuit in this case, irreconcilably conflicts with the application of Rule 37(b) in the Eleventh Circuit, as declared in *Seb S.A. v. Sunbeam Corp.*, 476 F.3d 1317, 1320 (11th Cir. 2007). The facts in *Seb* were identical to those in this case. The defendant had appealed a jury verdict in favor of the plaintiff, and the plaintiff had cross-appealed for more interest damages. The Eleventh Circuit affirmed the jury verdict but remanded for an

award of more interest. On remand, the district court entered an amended judgment, in which it corrected its error as to prejudgment interest. The district court also determined that pre-judgment interest ceased to accrue and post-judgment interest began to accrue on the date of its original judgment. The plaintiff, however, objected that Florida law required that pre-judgment interest accrue until the date of the post-remand amended judgment and that Federal Rule of Appellate Procedure 37 required that post-judgment interest begin to accrue on that date.

As here, the plaintiff appealed. Unlike this case, however, the Eleventh Circuit reversed. The court stated:

> To resolve this appeal, we must address two matters: first, under Federal Rule of Appellate Procedure 37, when postjudgment interest began to accrue; and second, whether prejudgment interest accrued until that date.

On the first issue, the court held:

> Because we did not provide instructions in our mandate or opinion regarding postjudgment interest, the district court had no choice but to begin postjudgment interest on the date of its amended judgment. When the district court determined that postjudgment interest instead began on the

> date of its original judgment, it exceeded the scope of its authority under Rule 37.[10]

The court then held interest must accrue until the last remand.:

> Because we did not provide instructions in our mandate or opinion regarding postjudgment interest, the district court had no choice but to begin postjudgment interest on the date of its [post-remand] judgment. ***When the district court determined that postjudgment interest instead began on the date of its original judgment, it exceeded the scope of its authority under Rule 37.***

Id. at 1320 (emphasis added). Thus, *Seb* is in direct conflict with the decision below where state law interest was terminated over four years before the last remand.

The Ninth Circuit has adopted the same rule. In *Planned Parenthood of Columbia / Willamette Inc. v. American Coalition of Life Activists,* 518 F.3d 1013, 1015, 1016 (9th Cir. 2008), the Ninth Circuit rejected a

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[10] *Accord National Fire Ins. Co. of Hartford v. Fortune Const. Co.*, 233 Fed. Appx. 890, 895 (11th Cir. 2007). The same result was reached in *Tronzo v. Biomet, Inc.*, 318 F.3d 1378, 1381-82 (Fed. Cir. 2003), in which the Federal Circuit, applying 11th Circuit law, held that, upon an "appellate lapse" in failing to include a direction as to interest in a remand mandate, the dispute as to interest was not presented to the district court, but rather the aggrieved party was required to apply to the appellate court for relief.

claim that the district court could award post-judgment interest from the date of the original jury verdict after the court of appeals had reduced a punitive damages award and remanded for the district court to order a new trial unless the plaintiffs accepted a remittitur. The court succinctly expressed its holding as follows:

> We hold that our failure to specify the accrual date for post-judgment interest in our mandate precluded the district court's order that interest would run from the date of the original judgment.

Id. This holding, like the Eleventh Circuit's holding in *Seb,* is in direct conflict with the Sixth Circuit rule adopted in *Bailey* and applied in this case.

III. THE PETITION PRESENTS ISSUES OF NATIONAL SIGNIFICANCE.

A. Overriding State Law and Rule 37 Creates Perverse Incentives to Losing Defendants in Diversity Cases to Appeal.

The conflict between the decision below and *Erie* and the conflict between the Circuits on the application of Rule 37 raise important issues of judicial administration in the federal courts.

Erie. Although federal courts address *Erie* issues in virtually every diversity case, they have received little guidance from this Court in the last four decades concerning the key substance versus procedure distinction. As a result, the lower federal courts have

pursued an approach to *Hanna* that blindly validates every application of arguably procedural federal statutes. This Court should intercede to restore the proper relationship between state substance law and federal procedural law.

Rule 37(b). Permitting trial courts to address interest damages issues that should have been resolved by the court of appeals before remand, as *Bailey* and the decision here condone, only encourages additional appeals. The present case offers a perfect example of the perverse incentive created by failure to apply Rule 37 properly. Autoliv had every reason to prosecute three unsuccessful appeals in this case because interest accruing during that appeal was less than its cost of capital. While neither §1961 or § 600.6013 totally eliminates that windfall, application of Michigan law at least reduces the windfall and the concomitant harm to Venture – the district court's decision deprived Venture of $4.75 million in interest to which Venture is entitled under Michigan law. That deprivation does not advance any federal policy.

B. Further Percolation Is Not Necessary To Resolve the Questions Presented.

The conflict between the decision below and *Erie* is patent. The narrow issue presented is simply whether *Erie* permits a federal court sitting in diversity to apply federal judge-made law (*Kaiser, supra*) to override state substantive law where the application of state substantive law would not contravene the federal interest in unfair procedures for federal courts and where both state and federal law seek the same policies. The clarity of this issue in this case offers the

Court an excellent opportunity to address an *Erie / Hanna* collision for the first time since *Gasperini* in a context where federal court housekeeping concerns do not conflict with state substantive law.

The conflict between the Circuits on the application of Rule 37 is also ripe for review. The court of appeals decisions cited above articulate the relevant issues and policies, and there is nothing to be gained by condoning the failures of circuit court panels to fulfill their responsibilities under Rule 37(b) or to permit trial courts to usurp those prerogatives.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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